Service Date: October 12, 2004

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER Of PSC Comments to the Federal Communications Commission in FCC-WC Docket No. 04-313 Regarding Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)))))))	**UTILITY DIVISION** **DOCKET NO. N2004.9.157**

COMMENTS OF BLACKFOOT COMMUNICATIONS, INC. AND ONEEIGHTY COMMUNICATIONS, INC.

Blackfoot Communications, Inc. ("Blackfoot") and OneEighty Communications, Inc. ("One Eighty") file these comments in response to the Montana Public Service Commission's ("PSC") Notice of Opportunity to Comment issued in Docket No. N2004.9.157. These comments specifically address the issues raised in paragraphs 9 through 13 of the Federal Communications Commission's ("FCC") *Order and Notice of Proposed Rulemaking* in WC Docket No. 04-313, CC Docket No. 01-338 released August 20, 2004 ("*Interim Rules Order*"), and replies to both Qwest Communications, Inc. ("Qwest") and the PSC's comments filed in that docket. Blackfoot and OneEighty agree with the PSC's conclusion that the FCC should require access to unbundled transport, local loops and mass market switching at TELRIC rates where the incumbent failed to challenge the FCC's *Triennial* impairment finding.

Thus, Blackfoot and OneEighty ask the PSC to take the next logical step: ask the FCC to make a conclusive finding that currently CLECs in Montana are impaired without access to those UNES. The record evidence (or lack thereof on Qwest's part) in combination with evidence now submitted by Blackfoot and OneEighty warrant such a finding. Telecommunications competition in Montana is developing and the only way to sustain and continue this still very nascent level of competition is if CLECs continue to have access to the essential, unbundled network elements at TELRIC prices offered by Qwest—the only other feasible alternative facilities provider in Montana.

I. Introduction

Blackfoot and OneEighty are two of a handful of facilities-based competitive local exchange carriers ("CLECs") providing integrated voice and data services in Montana. Blackfoot, offering competitive voice and data services to both mass market and enterprise customers, is the only facilities-based CLEC in Missoula. OneEighty, offering competitive voice and data services to both mass market and enterprise customers, is the only facilities-based CLEC in Billings and Bozeman.[1] Blackfoot has offered voice and data services over a combination of its own facilities and by purchasing unbundled loops from Qwest since 1998. OneEighty has provided mass market and enterprise CLEC services in Billings and Bozeman over a combination of its own facilities and by purchasing unbundled loops and the unbundled network element platform ("UNE-P") from Qwest since 1999.

[1] OneEighty also provides broadband services in Cody, Wyoming.

II. State of Competition in Montana

Although Montana is a rural state, it has pockets of semi-urban areas that make local telephone competition feasible. According to recent FCC statistical data, Qwest serves 363,764 access lines in Montana.[2] The same FCC data shows CLECs serve only 17,473 access lines in Montana--less than 5% of the total access lines served by Qwest in Montana,[3] and approximately 3% of the total lines served by all carriers in the state. This is one of the lowest percentages of CLEC penetration in the nation. Although cable television providers are offering broadband services in Montana, no evidence exists which shows cable providers are offering voice services anywhere in the state. In Missoula, Bresnan Communications, Inc. ("Bresnan") and USA Companies (dba Cable Montana, offering service to limited pockets of residential customers), the only local cable franchises offer broadband services to residential and business customers but no voice services. Similarly, the local cable franchise in Billing and Bozeman, Bresnan and Cable Montana offer no voice services, only broadband services. Prior to CLECs entering the market in Montana, Qwest was not offering higher speed broadband which many business demanded, nor was it offering an integrated T1 product, a service which allows a customer to purchase a single T1 and utilize it for both voice and data services. In Missoula, while Qwest is now offering higher speed Internet access, they are not offering integrated T1 service.

[2]Table 7.2, *Trends In Telephone Service,* Industry and Analysis and Technology Division, Wireline Competition Bureau, FCC, released May 2004 ("Trends in Telephone Service"). (*http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend504.pdf*)
[3] *Id.* at Table 8.5.

In Billings and Bozeman, Qwest only began offering integrated T1 service after CLECs began offering the service.

While Blackfoot and OneEighty are making competition a reality in Missoula, Billings and Bozeman, other CLECs are attempting to compete via UNE-P across the state. While facilities-based competition is not as prevalent in Montana as in other parts of the country, Blackfoot and OneEighty are proof that competition is economically feasible. As demonstrated below, this competition is only possible as long as CLECs in Montana have access to Qwest's UNEs.

<u>III. Response to USTA II's Criticism of the FCC's Impairment Test</u>

In responding to *USTA I's*[4] demand for a more "nuanced" application of the impairment standard, the *Triennial*[5] set-up an impairment test which held that CLECs are impaired without access to a network element if lack of access to that element "poses an entry barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic."[6] As part of its "granular" impairment analysis, the FCC said it may consider intermodal alternatives in any given market.[7] If the record developed by the FCC could not conclusively support a finding of impairment, the *Triennial* presumed impairment if certain competitive threshold "triggers" were not met in a particular market. States were then charged with conducting non-impairment findings

[4] *United States Telecom Association v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").
[5] *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 et al., FCC 03-36, 18 FCC Rcd. 16978 (Aug. 21, 2003) ("*Triennial*").
[6] *Triennial* at para. 84.
[7] *Id.* at para. 97-98

based on the *Triennial's* framework. In *USTA II*[8], the D.C. Circuit vacated this approach with the crux of the vacatur being that §251(d)(2) did not allow the FCC to subdelegate impairment determinations to state utility commissions. And while not specifically ruling on the other substantive merits of the *Triennial's* impairment analysis, the *USTA II* court did find that the FCC's definition of impairment was, in some instances, "vague almost to the point of being empty"[9] and, thus, laid-out some specific guidelines for FCC consideration.

A. The Presence of Intermodal Competition

One major criticism the *USTA II* court had with the *Triennial* was the FCC's failure to <u>require</u> the inclusion of intermodal alternatives in determining impairment.[10] In response to this mandate, Blackfoot and OneEighty argue that in Montana, the existence of intermodal alternatives to wireline telecommunications is scarce at best. The RBOCs argue that Commercial Mobile Radio Service ("CMRS"), Voice-over Internet Protocol ("VoIP") and voice services via cable television facilities are all intermodal alternatives. While this may be the case in some parts of the country, these services are not available to a majority of Montanans.

i.) CMRS

Wireless is not a substitute for wireline services in Montana. Montana's vast geography—jagged mountain peaks, deep valleys, isolated areas with sparse populations—make it infeasible for Montanans to rely on wireless services as their primary means of communications. Even the RBOCs admit that

[8] *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").
[9] *USTA II*, 359 F.3d at 572.
[10] The FCC "cannot ignore intermodal alternatives." *USTA II*, 359 F.3d at 572-73.

wireline and CMRS services are distinct product offerings.[11] SBC President Ed Whiteacre has been quoted as saying wireless is "not going to displace the wireline network. It's certainly going to be a big product, but it's never going to be the substitute. Reliability is one reason."[12] On this point, Blackfoot and OneEighty agree with the RBOCs.

Although in the *Triennial* the FCC cited that 3 to 5% of consumers utilize CMRS as their only telephone service, no evidence exists to suggest this is an upward trend.[13] The RBOCs only offer speculative evidence that CMRS will displace wireline connections.[14] And while this may be a nationwide trend, there is no evidence to suggest that the 3 to 5% of consumers that have wholly substituted CMRS for wireline is an accurate measure in Montana. Further, no empirical evidence exists showing that the majority of consumers view their CMRS phone as a substitute for fixed, wireline service. The RBOCs' can only offer speculative statements. While RBOC line counts have steadily declined since the passage of the 1996 Act, nothing suggests that the cause of this decline is the growth of CMRS subscribership. Indeed, in comparing CMRS growth over the last ten years, wireline loss is relatively flat.[15] Empirical evidence does, however, suggest that developing CLECs are a big reason why RBOCs

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[11] As part of Cingular's (owned by BellSouth and SBC) application for merger with AT&T Wireless, Cingular states: "the relevant product market for the analysis of this transaction excludes wireline service . . . At the present time, wireline service is sufficiently differentiated from wireless service to exclude wireline from the relevant product market." *See AT&T Wireless Services, Inc. and Cingular Wireless Corporation, Applications for the Transfer of Control of Licenses and Authorizations,* WT Docket No. 04-70, Declaration of Richard J. Gilbert at para. 44**.**

[12] *A Wireless World,* Business Week (October 20, 2003).

[13] *Triennial* at para. 445. The *RBOCs' Comments* attempt to inflate this number to 7 or 8 percent based on information from various financial institutions, but such reports admit that it is "difficult to calculate precise figures." *RBOCs' Comments* at fn. 136.

[14] *See RBOCs' Comments* at pp. II-28 – II-30.

[15] Compare *Trends in Telephone Service* Table 7.1 of with Table 11.1.

are losing lines. And this is an expected result of the 1996 Telecommunications Act—the RBOCs were monopolists. It was expected they would loose lines upon the opening of their markets to competition.

ii.) VoIP

VoIP is often cited as another popular intermodal alternative. But in Montana, only Qwest is offering VoIP service, and only in the Billings market. No evidence exists to suggest any other provider is offering VoIP services associated with a single Montana NXX. When discussing VoIP as a viable alternative to traditional telecommunications service, it is important to remember that VoIP is not in and of itself facilities-based telecommunications—it is a service that must ride over a carrier's broadband facility. Thus, VoIP requires the end user to purchase a broadband connection in addition to the VoIP service. Recent FCC data shows only 28,023 broadband connections in Montana.[16] Thus, VoIP's potential market-share in Montana is only for the 28,023 broadband connections in the state. By way of example, 2002 U.S. Census data revealed that there are 417,106 housing units in Montana.[17] Assuming all of Montana's 28,023 broadband connections are to households, this means that only less than 7% of Montana homes have access to VoIP services. Further, there is no evidence VoIP providers are offering service in Montana anyway, with the limited exception of Qwest's service in Billings. Vonage, the largest VoIP provider in the country, does not offer its VoIP service in Montana.[18]

[16] *Trends in Telephone Service* at Table 2.5.
[17] *Montana Quick Facts*, U.S. Census Bureau (http://quickfacts.census.gov/qfd/states/30000.html).
[18] *See www.vonage.com.*

Because Montana's broadband take rate is so small, this narrows the VoIP market to only that small number of broadband subscribers. And while VoIP is getting a lot of attention in both the media and from Wall Street as a viable alternative to traditional telephone service in some parts of the country, this is just not the case in Montana. Some have argued VoIP is poised to grow dramatically in the coming years. This may be true and someday VoIP may be a viable intermodal alternative, but today, at least in Montana, it is not. And even assuming VoIP were to take off in the next few years as more and more Montanans buy broadband connections, the competitive question remains: who will be able to provide the broadband facilities necessary to access VoIP services? If CLECs are squeezed out of the market, only the RBOC and the local cable franchise remain, creating a mere duopoly. Surely this was not the idea of competition Congress had in mind when passing the 1996 Act.

Thus, it is unclear whether any independent VoIP providers are actively marketing their service to Montanans; no evidence exists to suggest they are. And even if they are, only 7% of Montana households have the choice of using VoIP as an intermodal alternative.

iii.) Cable Television

In some parts of the country, cable television companies are providing a full range of competitive telecommunications services. This is not true in Montana. In Missoula, Bresnan and Cable Montana —the only local franchisees— do not offer voice services. Nor do Bresnan or Cable Montana in Billings or Bozeman. While it is true, VoIP service can be provided over broadband connections, as previously discussed, no evidence exists demonstrating cable companies or any other service provider are marketing or offering VoIP services in Montana. Thus, voice services through cable television providers is not a choice for Montanans.

As this evidence demonstrates, wireless, VoIP and cable television are not true intermodal competitors in Montana. This leaves CLECs as the only competitive choice for Montanans wanting both voice and data service from a single provider, and CLECs in Montana are having a hard time developing competitive networks in the state because they are impaired.

B. The *Triennial's* Definition of Impairment

While Blackfoot and OneEighty continue to develop and build-out competitive telecommunications networks, they are still running into significant barriers to entering the market. The *Triennial* outlined a number of factors to consider in the impairment analysis, including scale economies[19], sunk costs[20], first-mover advantages[21], absolute cost advantages[22] and barriers within the exclusive control of Qwest.[23] *USTA II* did not directly respond to this standard, but did indicate that this standard was an improvement over the Commission's

[19] "Scale economies refer to lower average costs from producing larger quantity of output . . . Scale economies can be a barrier to entry if entrants are likely to acquire fewer customers and sell less output than the incumbent, and the resulting higher average cost makes it unprofitable to enter the market." *Triennial* at para. 75 fn. 245.

[20] "Sunk costs are those costs that are unrecoverable from the market." *Triennial* at para. 75 fn. 244.

[21] "When a firm is able to gain an advantage in the marketplace as a result of entering the market first, it is said to have a first-mover advantage." *Triennial* at para. 75, fn. 249.

[22]"An incumbent has an absolute cost advantage if, for any given level of output, its per unit costs are lower than for an entrant. Possible sources of costs advantages include privileged access to resources, control of a better technology or more efficient means of production which cannot be duplicated by the entrant, limitations in the availability of productive factors, the learning curve, and a lower cost of capital." *Triennial* at para. 75 fn. 247.

[23] *Triennial* at paras. 87-91

past efforts.[24] Blackfoot and OneEighty believe the impairment factors listed in the in the *Triennial* are an accurate measuring stick which "explicitly and plausibly connects factors . . . in the impairment inquiry to natural monopoly characteristics."[25]

Specifically, the FCC found that "scale economies are necessarily more of a hurdle for small competitive LECs, which tend to have fewer customers."[26] In determining whether scale economies create impairment, the FCC concluded it would look at "whether the cost differences caused by scale economies are sufficiently large and persistent to make entry uneconomic."[27] As discussed above, Blackfoot and OneEighty operate small, local networks in three different Montana cities. Together, all CLECs in Montana only provide 17,473 access lines.[28] Qwest operates a world-wide network, including some of the largest local exchange networks in America (e.g. Minneapolis MSA, Denver MSA, Seattle MSA, Phoenix MSA, etc.). Nationwide, Qwest serves approximately 16.2 million access lines.[29] Blackfoot and OneEighty will never be able to serve a fraction of the customers Qwest serves nationwide. Even Blackfoot and OneEighty's ability to capture a fraction of Qwest's Montana customers seems unlikely.

Sunk costs in combination with scale economies pose a formidable barrier to entry for Blackfoot and OneEighty. As a result, Qwest has a significant first-mover advantage in Montana. Qwest has a clear advantage in obtaining

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[24] *USTA II,* 359 F.3d at 571.
[25] *Id.*
[26] *Triennial* at para. 87, fn. 283.
[27] *Triennial* at para. 87.
[28] *See* p.3, *supra.*
[29] *See Trends in Telephone Service*, Table 7.3.

preferential access to buildings and rights-of-way in Montana. Blackfoot and OneEighty, on the other hand, must negotiate municipal franchises, private right-of-way licenses and building access agreements that Qwest has had the luxury of avoiding because of its monopoly status. On occasion, Blackfoot has lost the ability to place customers on its own network because the customer has told Blackfoot it did not want the hassle of dealing with construction equipment on their property while Blackfoot installed fiber optic equipment. Similarly, Blackfoot has had commercial property owners decline to provide right of way, stating that Qwest facilities are available to the property, and that Blackfoot should use those facilities.

As a practical matter, most enterprise customers in Montana are medium to small businesses. Blackfoot and OneEighty take a substantial financial risk by building facilities directly to customer premises because of the high sunk costs involved. This problem is exacerbated by customer churn—if the customer decides to go back to Qwest, Blackfoot and OneEighty have not only lost revenue stream over that facility, but now the facility is stranded and it is unlikely they will ever be able to recoup their construction costs for that facility.

Lastly, Qwest has an absolute cost advantage over Blackfoot and OneEighty. In the *Triennial*, the FCC said:

> if the incumbent LEC is providing service at rates close to its average cost, competitive LECs may find it difficult or impossible to provide service in an economic fashion, because they will likely have higher costs than the incumbent LEC. Small disadvantages, however, will not pose a barrier unless they raise an entrant's costs above revenues."[30]

[30] *Triennial* at para. 90.

This is indeed the case in Montana. For example, Blackfoot and OneEighty rely heavily on UNE loops purchased from Qwest. The TELRIC price for a Zone 1 DS0 loop in Montana is $24.53.[31] By purchasing a DS0 loop and connecting it to its network, Blackfoot and OneEighty can provide local exchange telephone service to one customer. And the loop cost is only one element associated with Blackfoot and OneEighty's provision of local exchange service. Other significant costs include collocation, transport, switching, operational/customer service costs, and general and administrative costs, among others. In Montana, Qwest's basic, flat-rated residential local exchange service (which allows for unlimited local calling) retail rate is $16.73.[32] Add the $6.50 subscriber line charge,[33] and the end-user retail customer still only has to pay $23.23 per month for basic local service. As wholesale customers, Blackfoot and OneEighty have to pay more than one dollar more for just the loop portion. Add their other costs to provide that service, and they are several dollars more than the retail rate Qwest offers its residential customers. Clearly in this instance, Qwest has absolute cost advantages because the only way Blackfoot and OneEighty can effectively compete with Qwest in the residential market is by pricing their services below their own costs.

This example also clearly demonstrates that at least in Montana, the FCC was correct in the *Triennial* when it decided to consider regulated, below-cost

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[31] *See* Qwest Montana Statement of Generally Available Terms and Conditions, Appendix A. The Zone 1 DS0 rate listed above includes the DS0 loop rate ($23.90) and the interconnection tie pair costs ($0.63).

[32] *See* Qwest's local exchange tariff for Montana. (http://tariffs.uswest.com:8000/docs/TARIFFS/Montana/MTET/mt_e_t_s005p021.pdf#USW-TOC000000).

[33] *See* Qwest's Interstate Access Tariff FCC No. 1 (http://tariffs.uswest.com:8000/docs/TARIFFS/FCC/FCC1/fcc1_s004p001.pdf#USW-TOC000000)

retail rates as a factor that may impair CLECs in competing for mass market customers.[34] The RBOCs "strenuously" objected to this inclusion in the FCC's impairment standard, and the *USTA II* court appeared to hear their pleas.[35] But in Montana, Qwest has no reason to object. It is in Qwest's best interest to sell DS0 loops to Montana CLECs as opposed to their own retail customers because Qwest can make more money selling DS0 loops to CLECs at the rate of $24.53 per month than to its mass market retail customers at the rate of $23.23 per month. Thus, in Montana, Qwest can not rationally argue that regulated, below-cost retail rates should not be part of the impairment analysis. Indeed, Blackfoot and OneEighty are impaired by the low retail, residential rate, as they are unable to provide service to Qwest's mass market retail customers via a UNE-L platform without pricing their services below costs.

Thus, the economic impediments coupled with the lack of intermodal competitors in Montana demonstrates Blackfoot and OneEighty are impaired in their ability to provide competitive telecommunications services in Montana.

IV. Special Access

In *USTA II*, the court essentially directed the FCC to explain why special access is irrelevant to the impairment analysis. In Montana, special access should not be included in the impairment analysis because although access to RBOC transport services plays a minor role in the CMRS market, access to the RBOCs transport and high capacity loops play a major role in the CLEC market. Second, and more importantly, there are no other viable facilities providers in

[34] *Triennial* at para. 518.
[35] *USTA II*, 359 F.3d at 574.

Blackfoot's and OneEighty's service areas. The inclusion of special access in the impairment analysis would simply mean including two different prices for a single facility—the only facility available to Blackfoot and OneEighty—wholly owned by Qwest.

A. CLECs and CMRS providers are not similarly situated.

In *USTA II,* the D.C. Circuit court said the FCC "must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired."[36] By example, the court cited that the CMRS market has flourished with access only to the RBOCs' special access services. But wireline and CMRS network architectures are very different.[37] While CMRS carriers only need RBOC transport facilities to connect-the-dots of their backhaul network, CLECs rely on transport to both connect-the-dots of their backhaul networks and to connect end-user customers to CLEC networks. This is an absolutely key distinction because at least with the case of Blackfoot and OneEighty, they purchase many more high capacity loop facilities than they do transport facilities. Access to high capacity loops at UNE rates is crucial in order for Blackfoot and OneEighty to effectively compete against Qwest in Montana. Because of the basic difference in how CLECs and CMRS carriers use transport and high capacity loop facilities, the FCC should conclude that the RBOCs special access service offerings should not be included when determining impairment.

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[36] *USTA II*, 358 F.3d at 577.
[37] *See* fn. 11 , infra citing RBOCs admitting CMRS and wireline networks are different.

What the D.C. Circuit failed to recognize in *USTA II* is that CLEC access to special access facilities alone is not sufficient to sustain a facilities-based, competitive telecommunications market. Prior to the 1996 Telecommunications Act, a growing number of competitive access providers ("CAPs") were purchasing transport and high capacity loops out of the RBOCs' special access tariffs in an effort to enter the local telecommunications marketplace. This competition was slow in developing and was generally only profitable by serving large business customers. It was economically impossible for CAPs to build out their networks to connect every single building. True local telecommunications competition did not begin to develop and, in some instances "flourish," until after passage of the 1996 Act. This demonstrates how crucial access to high capacity loops and transport at UNE rates are to CLECs. Surely the *USTA II* court did not suggest that CLECs would not be impaired with access only to the special access facilities they had access to prior to the 1996 Act as this conclusion would render the effect of §§251-252 void. As a result, the FCC should exclude the availability of RBOCs' special access tariff offerings when determining the impairment standard.

B. The CLEC case in Montana.

In analyzing the reasons for the FCC's exclusion of tariffed special access services in the inclusion of the impairment analysis, the *USTA II* court criticized the FCC for creating a blanket exclusion to special access in considering impairment because "market evidence already demonstrates that existing rates outside the compulsion of §251(c)(3) don't impede competition" especially where "there is no claim that the ILECs would be able to drastically raise rates."[38] In Montana, this is an overgeneralization that simply is not grounded in the realities of the competitive telecommunications market. As discussed above, while CMRS carriers rely on access to Qwest's special access services merely for transport, CLECs could not survive in Montana if their only choice of facilities for transport and high capacity loops were special access. Such a move from TELRIC-based UNE rates to Qwest's special access rates would result in a rate shock for Blackfoot's and OneEighty's customers.

For example, a recent study cited the average cost increase to CLECs in Montana of migration to special access would be $290.23 per line.[39] The same study indicated the impact of this cost increase would result in a nearly 25% increase in the retail price CLECs would have to charge their customers.[40] And Qwest has recently made a move to raise special access rates on approximately 20% of its month-to-month special access rates.[41] As discussed below, because Blackfoot and OneEighty have no other alternative besides Qwest from whom to purchase high capacity facilities, Blackfoot and OneEighty would be at the mercy of Qwest's special access pricing. Any increase from what CLECs are paying now for such facilities would drive a dagger through the heart of competition in Montana.

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[38] *USTA II*, 359 F.3d at 576.

[39] *The Economic Impact of the Elimination of DS-1 Loops and Transport as Unbundled Network Elements* by Microeconomic Consulting & Research Associates, Inc. at 9 filed with the FCC in conjunction with a letter from H. Russell Frisby, Jr., CEO of CompTel/Ascent to Michael K. Powell, Chairman, FCC, CC Docket Nos. 01-338, 96-98 and 98-147 (filed July 9, 2004).

[40] *Id.* at 11

[41] *See Petition of Time Warner Telecom to Reject, or, Alternatively, Suspend and Investigate,* Revisions of Qwest Corporation to Tariff F.C.C. No. 1, Transmittal No. 206 at 9 (filed Aug. 23, 2004).

Blackfoot and OneEighty have no choice but to purchase facilities from Qwest. No alternative facilities providers have viable services for Blackfoot and OneEighty in Missoula, Billings and Bozeman. Both Blackfoot and OneEighty have looked extensively in their service areas for alternative facilities providers besides Qwest, but none are available. OneEighty has explored obtaining facilities from cable television providers, but to date, these providers have been unwilling to lease facilities to OneEighty.

After the *USTA II* vacatur, Qwest took the position in Montana that Blackfoot and OneEighty could only purchase high capacity loops and transport at special access rates. This was a surprise considering Qwest has <u>never</u> submitted evidence that CLECs in Montana are not impaired without access to high capacity loops and transport. Qwest's position on this issue is strange considering Qwest has filed extensive evidence showing non-impairment in several other markets outside Montana. On August, 20, 2004, Qwest submitted evidence to the FCC showing that CLECs are not impaired without access to high capacity loops and UNEs for a handful of large, urban markets.[42] In their *Interim Rules Order* comments,[43] Qwest, along with the other RBOCs, submitted extensive evidence of alternative facilities deployment in the top150 MSAs; Missoula, Billings and Bozeman are not among the top 150 MSAs. By submitting this evidence, the RBOCs attempt to convince the FCC that in top 150 MSAs, the RBOCs should only be required to offer special access services because CLECs

[42] *See* Ex Parte Letter from Cronan O'Connell, Qwest, to Marlene H. Dortch, FCC, Attach., CC Docket Nos. 01-338 *et al.*(Aug. 20, 2004) (showing evidence of multiple facilities providers in Denver, Phoenix, Minneapolis, Seattle and Salt Lake City).
[43] Comments of BellSouth, SBC, Qwest and Verizon, *UNE Fact Report*, WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 4, 2004) ("*RBOCs' Comments*").

are not impaired without access to UNEs. But this point ultimately undermines Qwest's position in Montana as Qwest never submitted evidence to the FCC, the PSC in the *Triennial* proceeding, nor in the current proceeding to show the presence of multiple facilities providers in any Montana city. This lack of evidence shows CLECs in Montana are clearly impaired without access to UNEs at TELRIC rates. Thus, it is untenable for Qwest to argue petitioners should only have access to high capacity loops and transport through special access tariffs in Montana.

The availability of high capacity loops and transport through special access tariffs will not allow competition to develop, let alone "flourish," in the wireline telecommunications market. Because CLEC and CMRS network architectures differ, the *USTA II* courts comparison does not apply to CLECs. In Montana, giving Qwest, the only viable facilities provider in Montana, unbundling relief and allowing them to charge special access rates (rates which they are already raising in some instances) will destroy facilities-based competition in Montana.

V. Montana CLECs Must Have Access to High Capacity Loops and Transport.

There is no question that Blackfoot and OneEighty are impaired without access to Qwest's high capacity loops and transport at TELRIC prices. As previously discussed, no other facilities providers are available in Missoula, Bozeman and Billings. The RBOCs submitted volumes of statistics and charts showing alternative facilities providers throughout the nation. More specifically, the *RBOCs' Comments* state "competing carriers already terminate their fiber networks in tens of thousands of buildings . . . And high capacity loops can be supplied competitively to any customer in these buildings, at any capacity from DS1 on up."[44] This conclusion is simply not true in Montana. In Missoula, Blackfoot has some buildings (by no means "tens of thousands") on-net—i.e. connected using their own fiber facilities. But besides Blackfoot, Qwest is the only other provider of fiber facilities in town. The situation is the same in Billings; OneEighty has connected some buildings onto its network via its own fiber optics, but Qwest is the only other facilities provider in those buildings. There simply are not competitive fiber providers in Missoula, Billings and Bozeman besides Blackfoot and OneEighty.

More importantly, the RBOCs failure to supply any evidence of alternative facilities providers in Montana proves Blackfoot's and OneEighty's point—no such facilities exist. Clearly if they did, Qwest, acting in its own best interest in hopes of obtaining unbundling relief, would have submitted any evidence of such non-impairment. The only conclusion that can be drawn from their failure to submit any evidence is they could not submit the evidence because there are no alternatives.

The *RBOCs' Comments* also point to evidence showing that many of the large, national IXCs and CLECs have captured "large enterprise" customers—i.e. Fortune 1000 companies, but then draws an irrational, blanket conclusion from this evidence that "this competition is quite sufficient to establish, without more, that healthy competition in the enterprise market does not depend upon UNEs

[44] *RBOCs' Comments* at III-31.

supplied by ILECs."[45] It is unreasonable to conclude that simply because several large, national CLECs have targeted and built facilities to the largest corporations in America that that should relieve Qwest of unbundling obligations for small and medium sized business in Missoula, Billings and Bozeman. Indeed, Blackfoot and OneEighty rely heavily on Qwest's UNEs to offer competitive alternatives to small and medium sized businesses in their respective service areas.

Lastly, the RBOCs argue that CLECs are not impaired without access to UNE high capacity loops and transport because of the wide-spread existence of "other competitive alternatives," namely fixed wireless, cable and special access. But again, the RBOCs' argument fails because there is no evidence that these "other competitive alternatives" work for Montana's CLECs. In their comments, the RBOCs submit a list of a number of fixed wireless providers in the top 150 MSAs. But no evidence is submitted for any location in Montana. While it is true OneEighty has experimented with a couple of fixed wireless solutions vendors (USA Digital and TransAria), these experiments have been unsuccessful due to technology difficulties and reliability issues. And while the RBOCs supply some anecdotal evidence of fixed wireless deployment, they fail to mention that nearly every CLEC that relied on fixed-wireless technology (e.g. Winstar, Advanced Radio Telecom, XO Communications, etc.) has disappeared into bankruptcy, proving fixed wireless is a risky endeavor. Given OneEighty's experience with its trials, it is not feasible for Montana CLECs to invest in and deploy a technology that has yet to prove itself in the field.

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[45] *RBOCs' Comments* at III-33.

As discussed above, some local cable franchises are rolling-out competitive broadband services in Missoula, Billings and Bozeman, but none of these cable providers are offering voice services, let alone integrated voice and data services. While OneEighty has explored the idea of purchasing wholesale transport facilities from the local cable franchise in its service area, the cable provider has refused to deal with OneEighty. Even so, it is unclear how either OneEighty or Blackfoot would interconnect their fiber, SONET-based telecommunications networks with a cable company's hybrid-coaxial network in order to provide integrated voice and data services. Research conducted by OneEighty shows interconnection with a cable network would not only be complex, but perhaps not even be economically feasible given the differing network architectures between cable and telecommunications networks.

Turning to the state *Triennial* proceeding in Montana, Qwest did not challenge the *Triennial's* impairment finding for high capacity loops and transport.[46] At the beginning of the proceeding, the PSC asked Qwest to set the scope of the impairment hearing. Although Qwest initially challenged the impairment finding for mass market switching, they never supplied the PSC with a single page of evidence suggesting CLECs are impaired without access to high capacity loops and transport.

As discussed further below, Blackfoot and OneEighty wholeheartedly agree with the PSC's conclusion that in states where the RBOC failed to challenge the *Triennial's* impairment standard, the FCC should conclude that

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[46] *Comments of the Montana Public Service Commission,* WC Docket No. 04-313, CC Docket No. 01-338 at 3 (filed October 4, 2004) ("*PSC Comments*").

CLECs are impaired in those states.[47] Since Qwest was unable to supply any evidence why CLECs are not impaired without access to high capacity loops and transport, the FCC should find that CLECs in Montana are impaired without access to these elements.[48]

VI. Access to UNE-P is critical to stimulate competition in Montana.

As the *USTA II* court said, the purpose of the 1996 Act "is to stimulate competition—preferably genuine, facilities-based competition."[49] Blackfoot and OneEighty agree and feel that the best way to stimulate facilities-based competition is to allow CLECs to purchase UNE-P as a market entry strategy. Once a CLEC reaches a certain threshold of UNE-P customers, regulations should be in place that allow the CLEC to transition those customers to its own switching facilities and the UNE-L platform. In this regard, Blackfoot and OneEighty support the plan proposed by ALTS that once a CLEC provides 1,344 lines via UNE-P in a given wire center, no additional lines would be eligible for UNE-P pricing.[50] This is an appropriate line threshold as it gives CLECs the ability to "test the waters" of a given market without having the risk of stranding enormous sunk costs. Blackfoot and OneEighty ask that the PSC urge the FCC to adopt the ALTS plan.

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[47] *PSC Comments* at 7.

[48] Absent this finding, Blackfoot and OneEighty support the Mayo/MiCRA/Bates White Economic Impairment Analysis and Analysis of State Specific Loop and Transport Data prepared by QSI Consulting, Inc. which was presented Ex Parte to FCC Staff on October 5, 2004 by the KDW Group, ALTS and CompTel/ASCENT. **NO MONTANA DATA IN THIS STUDY**

[49] *USTA II*, 359 F.3d at 576.

[50] *See Comments of the Association for Local Telecommunications Services,* WC Docket No. 04-313 and CC Docket No. 01-338 (filed October 4, 2004).

VII. Separate unbundling under §271

Regardless of what happens in this proceeding, the RBOCs clearly have a continuing unbundling obligation under §271. If the FCC were to determine that Qwest is relieved from unbundling high capacity loops, transport and mass market switching under §251(c)(3) in Montana, Qwest would still be required to offer those elements to CLECs under §§271(c)(1)(B)(iv)-(vi). The *Triennial* declared and *USTA II* upheld the notion that elements purchased under §271 must "not be unjust, unreasonable or unreasonably discriminatory."[51] The issue then becomes what is a just, reasonable and nondiscriminatory price under §271 for Montana CLECs. If it comes to this, the PSC has an important role to play and must initiate a proceeding to determine what just, reasonable and nondiscriminatory prices are for Montana CLECs when they purchase elements under §271.

VIII. Other Considerations

A. Relevant market definitions

Blackfoot and OneEighty believe that the best way to assess competition is by using a granular approach to geographic market definitions. For switching and loops, this analysis should be done on a wire center basis. For transport, the analysis should be done on a route-by-route basis. As discussed above, since no intermodal alternatives truly exist for most Montanans, CMRS, VoIP and voice

[51] *Triennial* at paras. 656-64. USTA *II* upheld the *Triennial's* distinction that UNEs purchased under §§251-252 are subject to TELRIC rates while elements purchased under §271 are subject to the Act's §§201-202 standard that they must "not be unjust, unreasonable or unreasonably discriminatory." *USTA II*, 359 F.3d at 589.

provided by cable television providers should not be included in the impairment analysis in determining the scope of the market in Montana.

Blackfoot and OneEighty also agree that the *Triennial's* distinction between mass market and enterprise customers is a necessary distinction. However, the FCC should declare with more specificity exactly how many lines are included in the "mass market" category.

B. Hot cuts.

The FCC should still consider the ability of Qwest to complete hot cuts when determining whether CLECs are impaired in Montana. As the *Triennial* pointed-out, the need to perform hot cuts can delay a CLEC in providing service with its own switch and can cause service disruptions, damaging customer perceptions of CLEC service and thus impairing the CLEC's ability to compete.[52] Performance issues still exist with Qwest's ability to perform the necessary hot cuts for CLECs in Montana. Blackfoot and OneEighty recommend that Qwest should be required to negotiate batch hot-cut procedures for less than 25 lines with CLECs. Because small CLECs like Blackfoot and OneEighty have limited resources, Qwest should be obligated to coordinate and negotiate the specific terms and conditions of the batch hot-cut process as it pertains to the CLEC customer's particular circumstances.

C. Enhanced Extended Links ("EELs")

The FCC should reaffirm is rules requiring RBOCs to offer CLECs EELs. In Montana, Qwest failed to challenge the *Triennial's* impairment finding for any elements. As discussed above, Blackfoot and OneEighty are impaired without

[52] *Triennial* at paras. 466-67.

access to both high capacity loops and transport, and thus EELs. Qwest has submitted no evidence showing Montana CLECs are not impaired without access to EELs.

IX. The PSC Should Recommend That The FCC Make A Finding That CLECs Are Impaired Without Access To Unbundled Transport, Loops and Switching.

Blackfoot and OneEighty wholeheartedly agree with the PSC that "the FCC should require dedicated transport elements (DS1, DS3 and dark fiber), mass market switching and local loops be made available to competitors in markets where the incumbent did not challenge at the state level the FCC's findings presuming CLEC impairment without access to those elements."[53] Since Qwest withdrew their challenge to the *Triennial's* mass market switching impairment findings, and the PSC correctly found that this fact coupled with "Qwest's representation that it could not unequivocally state that the three switch trigger could be met . . . there has been no showing that CLECs are not impaired without access to Qwest's switches to serve mass market customers."[54] Further, Qwest never even initiated a challenge to the *Triennial's* impairment finding for high capacity loops and transport in Montana. Based on these facts, the PSC should take the next logical step and ask that the FCC make a finding that CLECs in Montana are impaired without access to unbundled high capacity loops, transport and mass market switching at TELRIC rates subject to state jurisdiction.

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[53] *PSC Comments* at 7.
[54] *PSC Comments* at 3.

As discussed above, Blackfoot and OneEighty demonstrate that no viable alternative facilities providers exist in Montana. Even if the FCC determines the relevant market definition used is the entire MSA, it is clear that Blackfoot and OneEighty are impaired without access to high capacity loops, transport and switching in Missoula, Billings and Bozeman. Further, Blackfoot and OneEighty have demonstrated intermodal alternatives are not available to most Montanans. Blackfoot and OneEighty are the only true, facilities-based competitive integrated voice and data providers besides Qwest in Missoula, Billings and Bozeman.

An FCC finding of impairment is warranted because of the evidence supplied by Blackfoot and OneEighty and the lack of non-impairment evidence filed by Qwest in the *Interim Rules Order* proceeding. It is not reasonable that in the face of such clear evidence that Blackfoot and OneEighty should be held hostage to continued regulatory uncertainty in the availability of UNEs simply because the large CLECs and RBOCs are fighting-out the specifics of impairment on a national scale. Montana's telecommunications providers have supplied all the evidence there is. The impairment issue in Missoula, Billings and Bozeman is ripe for regulatory determination, and based on all the facts, the FCC has definitive evidence to conclude that CLECs in Missoula, Billings and Bozeman are impaired without access to Qwest's UNEs. In an effort to protect Montana's nascent, developing competitive telecommunications industry, the PSC should ask the FCC to make this finding.

Respectfully Submitted,

s/ *William A. Squires*
William A. Squires
Sr. Vice President – General Counsel
Blackfoot Telecommunications Group
1221 N. Russell St.
Missoula, MT 59808
(406) 541-5000

Chris Dimock
Christopher Dimock
President
OneEighty Communications, Inc.
206 N. 29th St.
Billings, MT 59101
(406) 294-4000

Dated: October 12, 2004

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached **Comments** have today been served on all parties entitled to receive the same, by mailing, first class postage prepaid, the original and requisite copies to the Montana Public Service Commission, and by mailing, first class postage prepaid, a copy to the other parties entitled to receive the same, at the addresses listed below, this 12th day of October, 2004.

____

Monica Tranel
Public Service Commission
1701 Prospect Avenue
Helena, MT 59601

Geoff Feiss
Montana Telecommunications Assoc.
208 North Montana Ave.
Suite 207
Helena, MT 59601

Mary Wright
Montana Consumer Counsel
616 Helena Ave., 3rd Floor
P.O. Box 201703
Helena, MT 59620-1703

Cheryl Gillespie
Qwest
441 North Park, Room 7
P.O. Box 1716
Helena, MT 59624-1716

Susan Lamb
Lamb Communication Services
111 Teal Lane
Sagle, ID 83860